

Title IX Regulations Part I: Before the Investigation

Chabot-Las Positas Community College District | November 15, 2022

Presented By: Jenny Denny & Amy Brandt



Title IX Regulations Part I: Before the Investigation

Presented By:

Jenny Denny & Amy Brandt / November 15, 2022

Agenda

- Status of the Title IX Regulations
- California Response to Title IX Regs: SB 493
- When Does the Institution Have Actual Knowledge
- Assessing Reports of Sexual Harassment and Determining Whether Title IX Applies (Jurisdiction)
 - Sexual Harassment Definition
 - Programs or Activities
 - In the United States
 - Options/Duties When Title IX Does Not Apply
- Supportive Measures
- Student Emergency Removals



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- Employee Administrative Leave
- Formal Complaints- Triggering the Grievance Process
- Advisors
- Dismissals
- Appeals
- Anti-Retaliation Protections
- Confidentiality
- Harmonizing with Cal. Law

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Title IX Developments

- July 2021: OCR issued Q&As on regulations
- August 24, 2021: OCR guidance re statements not subject to cross-examination are admissible
- July 2022: ED issued new proposed Title IX regulations
 - Public comment period open until September 12, 2022

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Title IX Required Training Components

- Definition of sexual harassment
- Scope of education program or activity
- How to conduct an investigation and prepare the investigative report
- How to implement grievance process
 - Hearings
 - Appeals
 - Informal resolution process
- How to serve impartially
- Decision-makers: Hearing technology and issues of relevance

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California's Response to the Title IX Regulations: Senate Bill 493



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Senate Bill 493: Effective Jan. 1, 2022

- Adds additional protections re sexual harassment
- Applies to institutions receiving state financial assistance including California Community Colleges
- Amended the definition of “sexual harassment” (Cal. Ed. Code § 66262.5.)
- Added procedural requirements for responding to notice of sexual harassment. (Cal. Ed. Code § 66281.8.)

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Cal. Ed Code: Training Employees

- A district must provide training to each employee engaged in the grievance procedures related to sex discrimination, including sexual violence. It must include training on:
 - Trauma-informed investigatory and hearing practices that help ensure an impartial and equitable process;
 - Best practices for assessment of a sexual harassment or sexual violence complaint;
 - Best practices for questioning of the complainant, respondent, and witnesses; and
 - Implicit bias and racial inequities, both broadly and in school disciplinary processes.
 - Statistics

Cal. Ed. Code §§ 66281.8(b)(6); 67386(b)(12).

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Training Employees and Notice of Obligation to Report

- A district must provide training to all employees on the identification of sexual harassment, including the person to whom it should be reported
 - A district is not required to provide separate training for identification of sexual harassment. It may include this requirement in existing employee training on sexual harassment
- A district must notify employees of the obligation to report harassment to appropriate school officials

Cal. Ed. Code § 66281.8(b)(8)-(9).



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Participant Background Poll



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Participant Background Poll

- Which Title IX role do/will you hold?
 - A. Coordinator
 - B. Investigator
 - C. Decision-Maker/Panelist
 - D. Advisor
 - E. Official with Authority
 - F. Other or multiple roles

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Title IX

Title IX prohibits discrimination that is:

- On the basis of sex
- In education programs or activities
- Receiving federal financial assistance

20 U.S.C. § 1681 *et seq.*
34 C.F.R. § 106 *et seq.*

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Title IX Protections

- Title IX protection applies to **all** students and employees
- Protects students and employees from sexual harassment committed by:
 - Students
 - District employees
 - Third-parties



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Assessing Reports of Sexual Harassment & Determining Title IX Obligations



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Title IX Preemption

- To the extent that state law already provides statutes or regulations that protect individuals from sexual harassment or discrimination, a district should comply with both the state requirements and the new regulations
- Conflicts: the Title IX regulations preempt state law

34 CFR § 106.6 (a)

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Actual Knowledge – Title IX

If District has actual knowledge of sexual harassment in its education program or activity against a person in the United States:

Must respond in a manner that is not deliberately indifferent.

34 CFR § 106.44(a)

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Actual Notice – Title IX

Notice to a Title IX Coordinator or any **official with authority** to institute corrective measures.

34 CFR § 106.30

An **official with authority** has the power to institute corrective measures on behalf of the institution.

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Cal. Ed. Code: Knowledge of Sexual Harassment

“A postsecondary institution shall be presumed to know of sexual harassment if a **responsible employee** knew, or, in the exercise of reasonable care, should have known, about the sexual harassment.”

An institution may rebut this presumption of knowledge if certain elements are met.

Cal. Ed. Code § 66281.8(b)(3)(C).

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Cal. Ed. Code: Definition of “Responsible Employee”

A “responsible employee” includes an employee

- With authority to take action to redress sexual harassment or provide supportive measures; or
- With a duty to report sexual harassment to an employee with such authority.

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Cal. Ed. Code: Who is a Responsible Employee?

• “Responsible employee” includes the following positions or positions with similar job duties (regardless of title):

- Title IX Coordinator
- Residential advisors
- Housing directors, coordinators, or deans
- Athletic directors, coordinators, or deans
- Athletic and academic coaches
- Faculty, associated faculty, teachers, instructors, or lecturers
- Graduate student instructors
- Laboratory directors, coordinators, or principal investigators
- Internship/externship directors or coordinators
- Study abroad program directors or coordinators

Cal. Ed. Code § 66281.8(a)(2)(B).

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Case Study: Actual Knowledge in California

James is the Athletics Director. Celia, a student worker who works in the gym, confides in him that she has been sexually assaulted by a coach. The District's policy says that all supervisors have a duty to report sexual harassment in the workplace. Does the District now have actual notice of a potential Title IX matter?

Yes, No, or Maybe

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Title IX Sexual Harassment: Three Categories

- Quid pro quo: An *employee* conditioning an aid, benefit, or service on complainant's participation in unwelcome sexual conduct
- Unwelcome conduct so severe, pervasive, **and** objectively offensive that it effectively denies a person equal access to education program or activity; or
- Sexual assault, dating violence, domestic violence, or stalking.

34 CFR § 106.30

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Title IX Sexual Harassment

- Determining severity, pervasiveness, and offensiveness
 - Not applicable to reports of quid pro quo sexual harassment
 - Not applicable to reports of sexual assault, dating violence, domestic violence, or stalking
 - Consider surrounding circumstances, expectations, relationships
 - Reasonable person standard

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Case Study: Sexual Harassment

Celia, who is a work study student, reports to the Title IX Coordinator the following:

James, the Athletics Director, has told her she can get more hours if she goes out with him. He only asked her out once. He did not reduce her hours when she said no.

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Correct/Incorrect/Maybe

Celia's report does not meet the definition of sexual harassment under Title IX because a reasonable person would not find the conduct so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the institution's education program or activity?

Correct, Incorrect, or Maybe

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Title IX - Education Program or Activity

- Locations, events, or circumstances over which the District exercised substantial control over respondent and context
- Any building owned or controlled by a student organization

34 CFR § 106.44(a)

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Title IX - Location of Incident

Sexual harassment must occur against the complainant **in the United States**

- Title IX not triggered by incidents outside the U.S.

34 CFR § 106.44(a)



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Case Study & Discussion

Rudy reports to the Title IX Coordinator that he recently broke up with Carlos, another student at the District, who he dated for two years. Carlos raped Rudy in their apartment as Rudy was trying to move out. Rudy and Carlos do not have classes together, but Rudy is afraid of Carlos.

Does the Title IX Coordinator have jurisdiction to file a complaint over the incident that took place in Carlos and Rudy's private apartment?



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Cal. Ed. Code: Duty to Respond

- Primary concern must be student safety
- Must take reasonable steps to respond to incident of sexual harassment,
 - whether occurring in connection with or outside of its educational activities or programs
 - whether occurring on or off campus
- if there is any reason to believe the incident could contribute to a *hostile educational environment or otherwise interfere with a student's access to education.*

Ed. Code § 66281.8(b)(3)

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Employee Issues

- Must respond to sexual harassment as defined by California Fair Employment and Housing Act (FEHA)
 - Sex harassment has a different definition under FEHA
 - Supervisors must report under FEHA
- Title IX obligations might conflict with collective bargaining agreements

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Title IX - Supportive Measures

- Individualized services offered as appropriate and reasonably available without charge
- Non-disciplinary and non-punitive
- Before or after or without formal complaint
- Available to Complainant and Respondent

34 CFR § 106.30(a)

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Title IX - Examples of Supportive Measures

- Medical/mental health services (or referral)
- Extensions of deadlines or other course-related adjustments
- Modifications of work or class schedules
- Campus escort services
- Mutual no-contact orders (*but not under Cal. Law unless justified/necessary*)
- Transportation accommodations
- Changes in work/housing locations
- Leaves of absence
- Increased security

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Triggering the Grievance Process



Overview of the Title IX Grievance Process



* Potential need for mandatory dismissal

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Title IX - When Does the Grievance Process Apply?

- For formal complaints of sexual harassment under Title IX
 - Not for informal complaints
- Not for sexual harassment that falls outside of the definition in the regulations
 - Instead follow California Law
- Not for discrimination: treating individual differently/unfavorably because of that person's sex

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Title IX - Grievance Procedures: Triggers

- A recipient must follow procedures consistent with section 106.45 in response to a **formal complaint**
 - See AHJCCD AP 3434, Responding to Harassment Based on Sex Under Title IX
 - Title IX Coordinator: Chief Student Services Officer
800 South College Dr., bldg. A-213
(805)922-6966 ext.3659
TitleIX@hancockcollege.edu

34 CFR § 106.44(b)(1)

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Title IX: Formal Complaint

- Document filed by the **Complainant** OR signed by the Title IX Coordinator
- Alleging sexual harassment AND requesting investigation

34 CFR §106.30(a)

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Title IX: Complainant

- The alleged *victim* of sexual harassment
 - Must be participating in or attempting to participate in the district's education program or activity
 - 3rd parties can report, but no 3rd party complaints

34 CFR 106.30(a)

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Title IX: No Formal Complaint Signed by Complainant

- If the alleged conduct falls under Title IX but the Complainant refuses to submit a formal complaint, the Coordinator must:
 - Become the signatory (but will not become the complainant) OR
 - Close the report

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Formal Complaint by Title IX Coordinator

Considerations

- Complainant's wishes
- Ability to conduct investigation without Complainant's participation
- District's need to protect campus safety
 - Respondent in position of authority
- Nature of alleged harassment
 - Multiple reports against same respondent

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Case Study & Discussion

The Title IX Coordinator receives a report from Julie who reports that Rudy is her friend and confided in her about the rape. She also reports that Carlos is stalking and harassing Rudy on and off campus, in person and via the cell phone, since they broke up two months ago. Julie has seen Carlos hit Rudy in the past and believes that Rudy is suffering from PTSD as the victim of domestic violence. The Title IX Coordinator contacts Rudy who refuses to file a complaint. Carlos is a popular student athlete and a member of the Model United Nations.

Should the Title IX Coordinator file a title IX complaint? Why?

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Title IX - Confidentiality

- The District must keep confidential the identity of
 - The Complainant, Respondent, or witness
 - Except as may be permitted by the FERPA; or
 - As required by law

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Cal. Ed. Code: Confidentiality

If a complainant reporting sexual harassment requests

- confidentiality or
- no investigation or
- disciplinary action

A district must generally grant the request, but must consider safety responsibilities and certain factors

Ed. Code § 66281.8(b)(3)

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Cal. Ed. Code: Confidentiality – Factors to Consider

- Whether there are multiple or prior reports against the respondent;
- Whether a weapon, physical restraints or battery was involved;
- Whether the respondent was a faculty or staff member with student oversight;
- The imbalance of power, if any, between the parties;
- The safety of complainant; and
- Whether a thorough investigation can be completed while maintaining the request for confidentiality.

If complainant's identity will be disclosed, complainant must receive notice prior to disclosure or investigation and District must take immediate steps to provide for the safety of complainant when appropriate.

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Title IX - Consolidating Complaints

Discretion to consolidate complaints:

- Arise out of the same facts or circumstances (so intertwined that their allegations directly relate to all parties) and
- Involve more than one complainant, more than one respondent, or counter-complaints



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The Grievance Process – Issues Before the Investigation



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Title IX - Notice of Allegations

Must provide written notice to the parties:

- Notice of the grievance process
- Presumption that Respondent is not responsible
- Statement that determination occurs at end of grievance process
- Notice of the allegations (date, location if known)
- Sufficient time to prepare before interview
- Right to advisor
- Right to Evidence Review
- Code of conduct provisions re: false statements and false information

34 CFR § 106.45(b)(2)(i)



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Title IX – Student Emergency Removal

- Available at any point in grievance process
- Possible after an individualized analysis
- Appropriate when **non-employee** Respondent poses immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment
- Must provide notice to Respondent & appeal
- Can be used to remove from class or campus

34 CFR § 106.44(c)



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Title IX - Emergency Removal

Considerations

- The particular Respondent and the specific circumstances;
- Whether there is an immediate threat
- Whether the threat is to the physical health or safety of one or more individuals
- Whether the emergency situation specifically arises from the allegations of Title IX sexual harassment.
- Applicability of any disability laws
- Appropriateness of other supportive measures in lieu of removal

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Case Study & Discussion

Carlos was arrested but released after a few days and has returned to school; the criminal proceedings are pending. The Title IX Coordinator considers an emergency removal against Carlos after meeting with Rudy to provide him with supportive measures. Rudy was nervous and appeared to have bruises on his arms and face.

Should the Title IX Coordinator seek an emergency removal against Carlos? Why?

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Administrative Leave

- District has authority to place **employee** Respondents on administrative leave during Title IX grievance process
 - Coordinate with HR to ensure compliance with CBAs and Ed Code
 - Example: faculty admin. leave per Ed. Code 87623

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Title IX - Mandatory Dismissal

Mandatory dismissal when:

- Conduct would not constitute sexual harassment;
- Conduct did not occur within the education program or activity; or
- Conduct did not occur against a person in the United States

34 CFR § 106.45(b)(3)(i)

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Title IX - Discretionary Dismissal

Discretionary dismissal when:

- Complainant withdraws complaint;
- Respondent no longer enrolled or employed; or
- Specific circumstances prevent district from gathering sufficient evidence to reach a determination

34 CFR § 106.45(b)(3)(ii)

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Title IX - Notice of Dismissal

Must provide prompt:

- Simultaneous notice of dismissal to the Parties;
- Include reasons for dismissal; and
- Appeal process

34 CFR §§ 106.45(b)(3)(iii),
106.45(b)(8)(i)

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Title IX - Appeals

- Must offer both parties an appeal from dismissal of a formal complaint/allegations based on:
 - Procedural irregularity;
 - Newly discovered evidence; or
 - A conflict of interest or bias by Title IX personnel
- May offer appeal to both parties on additional bases

34 CFR §106.45 (b)(8)(i) and (ii)

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Title IX - Role of Advisors

- Purpose: provide assistance and support to Party
- Individual of the party's choosing: family member, friend, an attorney, a neighbor

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Title IX – Role of Advisors Before Hearing

- Not required before hearing
 - May attend investigative interview(s), participate in evidence review, help Party prepare response to investigative report
- May not obstruct interview or disrupt grievance process
- May require confidentiality agreement

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Title IX – Role of the Advisor

- Hypotheticals for discussion:
- One of the advisors is an attorney and the other is not
 - An advisor fails to show up on the day of the hearing
 - A complainant insists that his advisor be someone who is also a witness

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Title IX – Retaliation

- Protects everyone who participates from retaliation
 - Such as intimidation, threats, coercion, or discrimination
- Cannot take action against anyone for refusing to participate
 - No threats of discipline for insubordination
- No additional charges for code of conduct violations that arise out of the same circumstances as Title IX report or complaint

34 CFR § 106.71

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Case Study: Employee Discipline

Carlos refuses to cooperate with the investigator. The Title IX Coordinator learns that Carlos, who is a talented mechanic, is now working as an adjunct at the college.

Carlos is an at will employee. Can the District terminate Carlos as an adjunct immediately because of the pending complaint?

Yes, No, or Maybe

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Case Study: Employee Discipline

Carlos refuses to cooperate with the investigator. Carlos is a talented mechanic working as an adjunct at the college.

Can the District discipline Carlos for insubordination?

Yes, No, or Maybe

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Case Study: Title IX Obligations

In March, campus security cameras captured an attack in a college parking structure. The Title IX Coordinator recognizes Carlos as the attacker. It appears from the footage that Carlos pulled Maria, a student from his auto mechanics class, into his car and sexually assaulted her. Maria refuses to speak to the Title IX Coordinator.

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Discussion

Does this trigger the District's Title IX obligations?

Because Maria refuses to file a complaint, what should the Title IX Coordinator do?

If a report is filed, should the Title IX Coordinator consolidate the complaints involving Maria and Rudy?



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Case Study: Dismissals

Carlos drops out of school and quits his adjunct job. The Title IX Coordinator learns Carlos has applied to teach at another community college district. The District must end the investigation since Carlos has left the District.

True, False, or Maybe



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Questions?



Next Title IX Training Series

Part II: Serving Impartially, Informal Resolutions and Investigations (3 hours)

- Serving with impartiality, and how to identify potential conflicts of interests
- Informal resolution process
- Trauma Informed Practices
- Investigations
- Notices
- Relevant evidence v. directly related evidence
- Privileges
- Evidence review
- Providing the investigative report to parties



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Next Title IX Training Series

Part III: Hearings, Determinations of Responsibility, and Appeals

An interactive review of the requirements for live Title IX hearings, including the role of advisors and decision-maker;

- The hearing, including suggested procedures
- Relevance and privileges
- Consent
- Credibility Determinations



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Next Title IX Training Series

Part III con't: Hearings, Determinations of Responsibility, and Appeals

- Testimony and questioning
- Burden of proof
- Determination Regarding Responsibility
- Findings and Conclusions
- Sanctions and Remedial Measures
- Appeals



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Thank You!

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